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No. 88-494
(Consolidated with No. 88-429)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WASHINGTON LEGAL FOUNDATION,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANT

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QUESTION PRESENTED

Did the district court, in correctly ruling that the American Bar Association's Standing Committee on the Federal Judiciary "fits squarely" within the definition of an advisory committee under the Federal Advisory Committee Act ("FACA"), nevertheless err in ruling that none of FACA's provisions may be constitutionally applied in this case because all such provisions would violate the separation of powers by interfering with the Executive's nomination power under Article II, especially where there was no record evidence suggesting that the application of any provision of FACA would in fact disrupt the nominating process in any way?

PARTIES TO THE PROCEEDINGS BELOW

Appellant Washington Legal Foundation was the plaintiff below. Appellee United States Department of Justice was the defendant. Appellee American Bar Association intervened as a party defendant after the judgment was entered solely for purposes of participating in this appeal. Public Citizen intervened as a party plaintiff below and filed a separate appeal in No. 88-429. Both appeals were ordered consolidated on December 5, 1988. *See* 109 S.Ct. 527 (1988).

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BRIEF OF APPELLANT

OPINION AND ORDER BELOW

The opinion and order of the United States District Court for the District of Columbia are officially reported at 691 F.Supp. 483 (D.D.C. 1988) and are reproduced in Appendix A annexed to the jurisdictional statement (J.S.) filed in No. 88-429 (App. 1a-28a).[1]

JURISDICTION OF THIS COURT

This is an appeal from the final judgment of the United States District Court for the District of Columbia,

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[1] "App." refers to the Appendix in No. 88-429; "J.A." refers to the Joint Appendix.

entered on August 8, 1988, granting appellee U.S. Department of Justice's motion to dismiss, or in the alternative for summary judgment, dismissing appellant's motion for summary judgment, and dismissing the action. App. 27a-28a.

Notice of appeal from that decision was filed by appellant on August 26, 1988 and its jurisdictional statement was filed on September 22, 1988. Probable jurisdiction was noted on December 5, 1988, and this and a similar appeal filed by Public Citizen in No. 88-429, were consolidated. 109 S.Ct. 527 (1988). Because the district court declared an Act of Congress unconstitutional as applied in a civil action to which the United States Department of Justice, an agency of the United States, was a party, this Court has exclusive jurisdiction under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, § 8, cl. 18 states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2, provides in pertinent part that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. III, § 1 states in pertinent part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Federal Advisory Committee Act, 5 U.S.C. App. II, is reproduced in App. 31a-45a.

STATEMENT OF THE CASE

Appellant seeks reversal of the lower court ruling which held that, although the American Bar Association's Standing Committee on Federal Judiciary constitutes an advisory committee under the Federal Advisory Committee Act because the Department of Justice utilizes it as a source of advice on the qualifications of potential judicial nominees, the application of FACA to that Committee would violate the separation of powers principle in that the Act has the potential for interfering with the President's appointment power (App. 27a). Since this Court must consider the statutory issue anew before it passes on the constitutional issue, appellant will brief both. In addition, appellant will briefly address the First Amendment issue raised by the American Bar Association in the Answer it filed after the judgment was entered in this case, but which was not passed upon by the court below. Appellant will also address the lower court's failure to allow discovery.

1. The Federal Advisory Committee Act

The Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), was enacted in 1972 by the Congress to regulate the operation of the thousands of advisory committees composed primarily of private citizens and "established or utilized" by the President, Executive branch agencies, and officials. *Id.*, §§ 2, 3 (App. 31a-32a). As an "open government" law, FACA is essentially an amalgam of the Freedom of Information Act, 5 U.S.C. 552 *et seq.*, and the Government in the

Sunshine Act, 5 U.S.C. 552b *et seq.*, *see* FACA, § 10 (App. 41a), and is therefore designed to promote and ensure integrity and accountability in the governmental decision-making process.

Just like other "open government" laws, FACA does not interject the Congress into any operation of the Executive branch. Rather, FACA, like the FOIA, leaves the execution and the administration of the laws with the Executive branch. The General Services Administration (GSA), an agency within the Executive branch, has promulgated regulations governing the operation of all advisory committees. *See* 41 C.F.R. Subpart 101-6.10. The "beneficiaries" of such laws are the public at large and those particular individuals and organizations who wish to obtain certain advisory committee documents or attend certain advisory committee meetings, subject to the exemptions from disclosure provided by both FOIA and the Sunshine Act, which exemptions are incorporated in FACA, §§ 10(b), 10(d).

The only role Congress provided for itself under FACA is an incidental one: charters of advisory committees must simply be filed with the appropriate "standing committees of the Senate and of the House of Representatives" having oversight of the agency utilizing the advisory committee. FACA §§ 5(a), 9(c) (App. 33a, 40a). Indeed, FACA expresses Congress' concern that advisory committees be advisory only and that they should not encroach upon or usurp the Executive's substantive decision-making powers. FACA, § 9(b) (App. 39a-40a).

While most litigation under FACA involves disputes over the operation of advisory committees "established" as such by the Congress, the President, or an agency -- such as disputes over the invocation of an exemption to keep a particular meeting closed -- other FACA litigation, such as the instant case, involves disputes about whether a particular private group being "utilized" by the Executive branch constitutes an "advisory committee" in the first place and is thus subject to FACA's requirements. *See, e.g., National Nutritional*

Foods v. Califano, 603 F.2d 327 (2d Cir. 1979) and other cases cited in the district court's opinion at App. 8a-11a.

2. ABA's Advisory Role With The Department Of Justice

The American Bar Association is an unincorporated association to which less than half of all American lawyers belong, and is classified as a "business league" exempt from taxation under 26 U.S.C. 501(c)(6). *United States v. American Bar Endowment*, 106 S.Ct. 2426, 2428(1986). Since 1952, the ABA's Standing Committee on Federal Judiciary, currently composed of 15 members hand-picked by the ABA's President, has screened judicial candidates for the federal bench at the behest of the Department of Justice (DOJ), by investigating them, evaluating their qualifications, and advising the Justice Department as to their suitability for positions on the federal district courts and courts of appeals (App. 10a).[2] The exact functions carried out by the ABA Committee, and its interplay with the Department of Justice, the President, and outside groups, has not been precisely determined in this litigation because of the absence of any discovery in this case and its predecessor, *Washington Legal Foundation v. ABA Standing Comm. On Federal Judiciary*, 648 F.Supp 1353 (D.D.C.1986) ("*WLF I*"). Nevertheless, the general information provided by DOJ in the instant case and by the ABA in *WLF I*, while sometimes vague and conflicting,

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[2]The use of the ABA Committee by the DOJ to screen *potential* candidates for the Supreme Court has been episodic, but the ABA Committee does not consider itself foreclosed from exercising that function. *See ABA Standing Committee on Federal Judiciary: What It Is and How It Works* 7 (1983) ("*ABA Brochure*") (J.A. 49). The ABA Committee, however, provides the Senate Judiciary Committee with its assessment of *all* nominees for both the Supreme Court and lower federal courts. *Id.* For an excellent account of the advisory role that the ABA has played in the judicial screening process over the years, see J. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (1965).

sufficiently describes the ABA's advisory role to support the lower court's conclusion that the ABA Committee is an advisory committee under FACA.

According to the Declaration of Steve Matthews, Deputy Assistant Attorney General, Office of Legal Policy, the "President's federal judicial selection committee," allegedly composed of "immediate advisers to the President," selects potential nominees for a particular federal court vacancy. Matthews Dec. ¶ 7 (J.A. 21).[3] The names of potential candidates submitted to the DOJ and/or the President's federal judicial selection committee come from a variety of sources, although the Senator of the same party as the President from the state in which a district court vacancy occurs, usually proposes one or more candidates for a judicial vacancy, and historically, that Senator's choice is given preference over other candidates. *See* Grossman, *supra* at 27.

Once the candidates are pre-selected by this committee, the Assistant Attorney General, Office of Legal Policy, notifies the candidates and requires them to complete an ABA-designed Personal Data Questionnaire to be sent to him and to the ABA Committee. Matthews Dec. ¶ 8 (J.A.22). He then requests the ABA Committee to investigate and evaluate the candidates' "qualifications" and to advise him of the results. Matthews Dec. ¶ 8 (J.A.22).[4] The ABA's relationship with the DOJ in this

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[3]The exact composition of this "committee" is unclear. While it does include such Presidential advisers as the Counsel to the President, it is questionable whether certain other members of the committee, such as the Deputy Assistant Attorney General of the Office of Legal Policy of the Justice Department, can be characterized as "immediate advisers to the President." In any event, this committee does not, as a committee, advise the President of anything, but only pre-selects potential candidates for DOJ's investigation and consideration.

[4]The ABA Committee apparently does not communicate with or directly advise the President, the Counsel to the President, or the Attorney General. The ABA Committee instead gives its advice directly to the Assistant Attorney General, Office of Legal Policy, who is charged with the duty to "[a]dvise and assist the Attorney General and the Deputy Attorney General regarding the

regard is exclusive: no other private organization or committee is called upon by the DOJ to advise it of the qualifications of applicants for judicial posts (App. 9a).

The ABA Committee then designates one of its members from the relevant circuit to investigate the qualifications of the candidate, and to evaluate the candidate's "competence, integrity and judicial temperament," although it is unclear what these criteria mean. *ABA Brochure* 5 (J.A.47)[5]

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selection and appointment of Federal judges." 28 C.F.R. 0.23(d). *See also* Matthews Dec. ¶ ¶ 8-10 (J.A.22).

[5]WLF alleged in its Complaint that the ABA has investigated the political and ideological beliefs of various candidates. WLF Complaint ¶ 10 (J.A.7). The ABA's denial of this allegation (ABA Answer ¶ 10) (J.A.65) is suspect. The 1979 edition of *The ABA's Standing Committee On Federal Judiciary, What It Is and How It Works, reprinted in Hearings Before the Senate Comm. of the Judiciary on Selection and Confirmation of Federal Judges*, 96th Cong., 1st Sess. 106 (1979), states unequivocally: "The Committee does not attempt to investigate or report on political or ideological matters with respect to the prospective nominee." However, in the 1983 version utilized during most of the Reagan Administration, that sentence was modified to read: "The Committee does not investigate the prospective nominee's political or ideological philosophy *except to the extent that extreme views on such matters might bear upon judicial temperament or integrity.*" *Id.* at 4 (J.A.45) (emphasis added). One wonders how the ABA Committee can determine which views are "extreme" and which are not unless it undertakes by itself, or in cooperation with other groups, to investigate the political and ideological philosophy of the candidate. This "exception" clause appears broad enough to swallow up the alleged rule that the candidate's political views are not investigated. Indeed, this sentence has been recently modified yet again. In the June 1988 version of the *ABA Brochure*, the relevant sentence now reads: "Political or ideological philosophy are not considered, except to the extent they may bear upon the other factors." *ABA Brochure* 4 (1988). It now seems that the ABA believes that even the *non*-extreme political or ideological views of a candidate can be considered in evaluating the qualifications of candidates.

For example, James L. Graham from Ohio was under consideration for a district court judgeship in that state. Despite impeccable credentials (including 15 years extensive federal/state litigation practice; American College of Trial Lawyers fellow; Ohio Board of Bar Examiners for 5 years, including being its Chairman; prolific writer and lecturer; faculty with Ohio Judicial College (for judges); pillar of community; ABA member for 24 years), Mr. Graham received the lowest "qualified" rating from the ABA Committee with a minority report indicating that he was "unqualified." The reasons for such an unexpectedly low rating appear to have stemmed from the ABA Committee's investigation of Mr. Graham's "conservative Christian" religious beliefs. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of*

That investigator conducts a number of allegedly "confidential" interviews with lawyers, judges, professors, and others, and examines the candidate's writings and other information. *ABA Brochure* 5 (J.A.47). [6]

He then prepares a "written informal report" about his investigation, and, along with the ABA Committee Chairman, makes an initial evaluation of the candidate, assigning one of four recommended ratings to him: (1)"exceptionally well qualified," (2) "well qualified," (3) "qualified," and (4) "not qualified." According to the ABA, the substance of this informal report and the initial rating are passed on to DOJ, and only the *identity* of the sources, as opposed to the information they provided, remains confidential. *ABA Brochure* 6 (J.A.48). The ABA Committee representatives may meet with DOJ officials to discuss this initial and crucial evaluation. *Id.*[7]

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the United States, Hearings Before the Committee on the Judiciary of the United States Senate, 100th Cong., 1st Sess. 924 (1987) (remarks of Senator Simpson) (questioning Judge Harold R. Tyler, Jr., Chairman, ABA Committee, about ABA's consideration of the ideology of Judge Bork and other judicial nominees). *See also Legal Times*, Dec. 15, 1986, at 1. WLF proffered below, and will refer *infra*, to other apparent abuses by the ABA Committee that FACA was designed to deter.

[6]The Matthews Declaration, however, gives no indication whatsoever that DOJ requires or regards the ABA investigation to be "confidential," or that application of FACA would disrupt the nominating process in any way. The *ABA Brochure* refers to the confidentiality of the *name* of the candidate, but admits that "public knowledge [of the candidate's name] is usually not harmful and may be beneficial in some circumstances in that it encourages investigation into the background and personal history of the prospective nominee by other persons. It is in the public interest to avoid an appointment without full information about the appointee." *ABA Brochure* 9 (J.A.52);(App. 6a, n.20). DOJ has admitted that "confidentiality" is selectively maintained, and that the underlying reasons for an ABA evaluation are "sometimes" disclosed by the ABA to DOJ, and to the Senate Judiciary Committee. *See* Defendant's Response to WLF's Statement of Material Facts, ¶ 9. (J.A.61) (App. 6a, n.20).

[7]No one, including the former chairman of the ABA Committee on Federal Judiciary, seems able to understand -- let alone articulate -- the different bases for the three qualified ratings. For example, during the 1984 confirmation hearings of James Harvie Wilkinson III for a seat on the United States Court of Appeals for the Fourth Circuit, Frederick G. Buesser, Jr., then Chairman of the ABA Committee, testified that he rated Professor Wilkinson

If the initial rating is "not qualified," the withdrawal of the candidate from any further consideration by DOJ is almost a certainty. *See ABA Brochure* 7 (J.A.49). In such a case, the candidate's name rarely reaches the President's desk for consideration.

If the initial rating of the candidate is "qualified" or better, the ABA investigator then prepares and circulates a *final*, formal written report to the full ABA Committee, which then meets to discuss the nominee and determine his final rating. (App. 6a). That rating is forwarded to the Assistant Attorney General, Office of Legal Policy, along with an indication as to whether the rating was supported by a "majority, a substantial majority or unanimous vote of the ABA Committee." Matthews Dec. ¶ 10 (J.A.22).[8]

The Attorney General then considers the ABA Committee's final recommended rating in making "*his own* recommendation of *a* candidate to the President." Matthews Dec. ¶ 4 (emphasis added) (J.A.21); Def. Statement of Material Facts, ¶ 7 (J.A.35). Thus, it is the

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merely "qualified" (the lowest of the three qualified ratings) "because, as I have said in my several letters, I believe that he has the capacity to become an outstanding appellate court judge. He was *remarkably well qualified* for that kind of work...." *Confirmation Hearings On Federal Appointments, Hearings before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. Part 3 at 330 (1984) (Statement of Mr. Buesser) (emphasis added). Apparently, in ABA jargon, "remarkably well qualified" means something less than "well qualified." Under FACA, the public, and judicial candidates, would be able to learn more of the Committee's inscrutable rating system, and the ABA would be less likely to act in an arbitrary manner.

[8]It is unclear what is meant by "substantial majority," nor is it clear whether the substance of this final report is conveyed to DOJ, or whether there is an explanation for any difference between the initial and the final rating or indeed, whether the final rating is really "final." In one such case, Judge Kenneth Porter, an experienced and respected state judge in Tennessee, received a unanimous "qualified" rating from the ABA for a federal district court judgeship and was nominated by President Reagan on July 25, 1986. Judge Porter appeared before the Senate Judiciary Committee in September for his confirmation hearings, but the Congress adjourned before acting upon the nomination. Instead of being resubmitted during the new 99th Congress, Judge Porter's nomination was derailed because the ABA Committee had changed its mind in the interim, and had re-evaluated him as "not qualified." *See Knoxville News-Sentinel*, July 31, 1987, at 1, col. 1

Attorney General rather than the "President's federal judicial selection committee" that actually recommends the particular candidate to the President. The record does not indicate whether the President has ever rejected the Attorney General's recommendation.

3. Legal Proceedings

On December 11, 1985, appellant Washington Legal Foundation originally filed suit only against the ABA Committee, its members, and the ABA, seeking declaratory and injunctive relief that FACA applies to the Committee's advisory role with the Department of Justice in the screening and selection of judicial candidates suitable for consideration by the President. *See Washington Legal Foundation v. American Bar Ass'n Standing Comm. on Federal Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986) (*"WLF I"*). That suit was instituted after the Committee had expressly refused to comply with WLF's repeated requests for information that the Committee had shared with certain liberal activist groups, and had also rejected WLF's request for information about its meetings, stating that it did not consider FACA to apply to any of its activities. *See* Exhibits A-D to WLF's Complaint (J.A.13-19).[9]

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[9]While *WLF I* is not before the Court in this appeal, a brief description of it will help place the instant case in proper perspective, especially since the court below bootstrapped the alleged "findings" from *WLF I* into its decision in the case at bar.

Shortly after filing its complaint in *WLF I*, WLF attempted to conduct discovery. However, the district court, over WLF's opposition, ruled on February 5, 1986, that discovery was "premature," apparently because of representations that the ABA defendants would file a dispositive motion. The ABA Committee subsequently filed an Answer and motions to dismiss, arguing, *inter alia*, that WLF lacked standing, that FACA does not apply to the ABA Committee, and that if FACA did apply, it would violate the separation of powers by interfering with the President's nominating power under Article II, as well as violate the ABA Committee's first amendment rights.

On April 8, 1986, WLF filed an opposition to the motion to dismiss, and shortly thereafter attempted to add the Department of Justice as a defendant to the case. Because the Court inexplicably denied WLF's motion to add the DOJ as a defendant, and because the United States declined the Court's

WLF filed the instant action ("*WLF II* ") directly against the Department of Justice on October 11, 1986 seeking declaratory and injunctive relief under FACA and the Administrative Procedures Act, 5 U.S.C. 706 (J.A.11) In *WLF II*, the Department of Justice filed a motion to dismiss WLF's complaint on January 2, 1987, accompanied with a Declaration by Steve A. Matthews, Deputy Assistant Attorney General, Office of Legal Policy. That motion raised essentially the same arguments as did the ABA Committee's motion to dismiss in *WLF I*, that is, that the ABA Committee is not an advisory committee, and that if FACA were to apply, the separation of powers would be violated. DOJ's motion, however, did not raise the issues of standing or the First Amendment.

On February 4, 1987, WLF filed its opposition to the motion to dismiss. On the same day, appellee Public Citizen moved to intervene as a party plaintiff or in the alternative as an *amicus curiae*, and filed a proposed complaint and motion for summary judgment. On March 11, 1987, the district court granted Public Citizen's motion to intervene and permitted its complaint and motion for summary judgment to be filed.

On March 25, 1987, DOJ filed a memorandum that served both as a reply to WLF's opposition to DOJ's motion to dismiss, and as an opposition to Public Citizen's motion for summary judgment. DOJ also filed a Statement of Material Facts. Since DOJ never filed a formal motion for summary judgment, it was unclear

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invitation to intervene in the case, WLF filed the instant action on October 21, 1986, against the Justice Department. *Washington Legal Foundation v. U.S. Department of Justice*, No. 86-2883 (D.D.C.) (*WLF II*).

Finally, on November 26, 1986, the district court granted the ABA Committee's motion to dismiss in *WLF I*, ruling that while our allegations of injury were sufficient to confer standing, a suit under FACA lies only against the agency utilizing the committee, *i.e.*, the Justice Department. 648 F. Supp. 1353 (D.D.C. 1986). WLF appealed that dismissal to the United States Court of Appeals for the District of Columbia Circuit, which has held the case in abeyance pending resolution of the instant case. *WLF v. ABA Standing Comm.*, No. 87-7022 (D.C.Cir.). Public Citizen did not intervene in that action.

whether the court would treat DOJ's motion to dismiss as one for summary judgment.

Accordingly, on April 30, 1987, appellant WLF filed a conditional response to DOJ's Statement of Material Facts and an Affidavit under F.R.Civ.Pro. 56(f), indicating that it needed discovery in order to respond to and oppose some of the assertions made in DOJ's Statement of Material Facts, which information was exclusively in DOJ's hands. (J.A.54) The court also signed an order on April 30 setting the case down for oral argument on "cross-motions for summary judgment," thereby indicating for the first time its intention to treat DOJ's motion to dismiss as a motion for summary judgment. On May 12, WLF filed an "alternative" motion for summary judgment for the court to consider if it were inclined to grant Public Citizen's motion for summary judgment. Yet by having filed a Rule 56(f) Affidavit, WLF still maintained that summary judgment was improper at this stage for DOJ.

Oral argument was held on May 26, 1987, and the court took the matter under advisement for over 14 months. On August 4, 1988, the court finally issued its opinion, holding that the ABA Committee is an advisory committee under the Act, but held that the application of any of FACA's provisions would violate the separation of powers doctrine by potentially interfering with the power of the President under Article II to nominate federal judges (App. 26a-27a). The court held that the "role of Congress is limited to the Senate's advice and consent function" and that the "purposes of FACA are served through the public confirmation process" (App. 27a). The court concluded by stating that "any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality" with respect to judicial nominees, *id.*, but it reached this conclusion, (a) without clarifying precisely what information must be kept confidential; (b) without citing any record evidence from DOJ that application of FACA to the ABA Committee would in fact interfere with the nominating process; and (c) without considering

provisions of FACA that do not raise confidentiality concerns, or indeed, that make express accommodations for them.

On August 25, 1988 the American Bar Association intervened for purposes of this appeal and filed an Answer to WLF's and Public Citizen's Complaints (J.A.62, 69).

SUMMARY OF THE ARGUMENT

The district court properly held that the ABA Committee constitutes an advisory committee under the Federal Advisory Committee Act because it is utilized by the Department of Justice to screen judicial candidates to the federal bench, and to advise the Department of the candidates' qualifications. To hold otherwise would simply violate the plain meaning of the words of the statute, frustrate the intent of the Congress that enacted the law, be inconsistent with the implementing regulations promulgated by the General Services Administration, conflict with past practice of the Executive branch, and be contrary to the controlling weight of case law. The court could not legitimately and fairly construe FACA's broad remedial language in such a way as to exempt the ABA Commmittee in order to avoid addressing the separation of powers argument raised by the government.

The court, however, seriously erred in ruling that none of FACA's provisions, whose implementation are entrusted to the Executive branch, can be applied in this case because FACA's potential for interfering with the President's power under Article II to appoint federal judges is so great that it amounts to an unconstitutional breach of the separation of powers. The court was wrong to have reached this sweeping conclusion without any record evidence from the government that the application of FACA would be disruptive of the exercise of the President's nominating power, and without examining the provisions of FACA that would appear to accomodate the exaggerated and unfounded fears of FACA's alleged

intrusiveness in the Presidential decision-making process. FACA is simply a procedural statute that regulates the manner in which the Executive branch utilizes private advisory groups in order to ensure the integrity and accountability of the governmental decision-making process. FACA does not usurp any substantive power that the President has under the Appointments Clause.

FACA's application to the ABA Committee would not violate its First Amendment rights as it claims since the Committee has voluntarily agreed to perform a public or quasi-public function that if anything, makes the ABA Committee liable as a "state actor" for its conduct. The lower court also improperly granted summary judgment for the defendant without allowing appellant to take discovery to rebut the claims of the Justice Department and to place the case in a firm factual setting for proper resolution of the constitutional issues.

ARGUMENT

I. THE LOWER COURT CORRECTLY FOUND THAT THE ABA COMMITTEE "FITS SQUARELY" WITHIN THE DEFINITION OF "ADVISORY COMMITTEE" UNDER FACA AND GSA REGULATIONS.

While as a general rule, a court should avoid reaching a constitutional issue by ascertaining "whether a construction of the statute is fairly possible by which the question may be avoided," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), FACA simply could not be fairly construed in such a way as to exempt the ABA Committee completely from its coverage. *See United States v. Locke*, 471 U.S. 84, 96 (1985); *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986).

This Court has repeatedly affirmed the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania,*

Inc., 447 U.S. 102, 108 (1980). Stated another way, courts are required to assume "that the legislative purpose is expressed by the ordinary meaning of the words used," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richard v. United States*, 369 U.S. 1, 9 (1962)). *See also INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1213, n.12 (1987) (Court looks to message conveyed by "the plain language of [the] statute" and looks at the "legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language"). In addition, in considering statutes which have broad remedial purposes, such as FACA, a court must take care not to narrow the coverage. *See Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).[10]

Applying these basic principles of statutory construction to the statute and facts in the case at bar leads to the inescapable conclusion that the ABA Committee is an advisory committee under FACA.

A. The Statutory Language

Section 3 of FACA broadly defines the term "advisory committee" as "any committee, board, commission, ... task force, or other similar group, or any subcommittee or other subgroup thereof ... which is ...

> (B) established or *utilized* by the President,
>
> or
>
> (C) established or *utilized* by one or more agencies, in the interest of obtaining *advice or*

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[10] In *Sedima*, the lower courts had held that a "narrow construction of the statute was essential to avoid intolerable practical consequences," and that a broad construction "would raise severe constitutional questions...." 473 U.S. at 491-92. This Court reversed, noting the broad remedial purposes of the statute in question, and concluding that "[w]e do not view the statute as being so close to the constitutional edge," *id.* at 492, and that "[e]ven were the constitutional questions more significant, any doubts would be insufficient to overcome the mandate of the statute's language and history." *Id.* at 492, n.11.

> *recommendations* for the President *or* one or more agencies *or* officers of the Federal Government...."

Id. § 3(2)(emphasis added). The ABA Committee would thus constitute an advisory committee under FACA if it is a "committee" "utilized" by DOJ for "advice or recommendations."

In the first place, the ABA Committee is obviously a "committee," in that it is both denominated and structured as such (J.A.43). It is just as obvious that the Committee satisfies the other statutory criteria. As the lower court correctly found:

> Interpreting the term "utilization" is not as complicated a task as defendant suggests. The common-sense meaning of "utilized" is "to make use of." *Webster's Third New International Dictionary* (1963). The facts [of this case] easily support the conclusion that DOJ "makes use of" the ABA Committee by directly and preferentially soliciting its assistance and *recommendation* on judicial nominees.

App. 8a (emphasis added).

There can be no doubt that the ABA's evaluation of a candidate's fitness to be a federal judge constitutes "advice or recommendations" to the Justice Department. The word "recommend" means "to make a commendatory statement about as being fit or worthy (as for a job)." *Webster's Third New International Dictionary* 1897 (1976). The ABA Committee's evaluation and rating of a judicial candidate clearly constitute a statement about the fitness of the candidate to be a federal judge.[11]

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[11] A candidate rated by the ABA as "qualified," for example, is considered by the ABA to be fit "to perform satisfactorily as a federal judge." *See ABA Brochure* at 5. (J.A.46). A candidate rated "well qualified" is worthy of the "Committee's strong *affirmative endorsement*...." *Id.* (emphasis added). Those candidates found to be "not qualified" are considered unfit for the job

But even if the ABA Committee's evaluation did not constitute a "recommendation" to DOJ, FACA's operative language would still apply, since it is couched in the disjunctive ("advice *or* recommendations"). Both the Justice Department and the ABA readily use the term "advice" in describing their relationship with each other. *See e.g.,* Matthews Dec., ¶ 4 (J.A.21) (the ABA Committee is a "source[] of... advice" for DOJ); ABA Answer, ¶ 8 (J.A.64) (ABA Committee "advises the Department of Justice of [the ABA's] investigations and evaluations" of judicial candidates).[12]

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from the ABA's viewpoint. *Id.*

[12]In *WLF I*, the ABA steadfastly denied that the ABA Committee is an advisory committee under FACA, but suggested that it would be such if it supported or opposed a prospective judicial nominee, rather than simply evaluated him. *See* ABA's Motion to Dismiss at 39; ABA Answer ¶ 4 filed in *WLF I*. The ABA reaffirms this position here. *See* ABA Memorandum in response to the Jurisdictional Statements ("ABA Mem.") at 17. While such a distinction is not determinative of the ABA Committee's status under FACA, WLF nevertheless made this very allegation in its Complaint in the case at bar:

> 14. The ABA Committee has opposed or supported and continues to oppose or support judicial candidates for nomination and appointment as authorized by the ABA By-Laws and other governing documents. (J.A. 8).

Since DOJ never filed an Answer in this case, it never denied the allegation. The ABA, when now presented with the clear and ample opportunity to admit or deny this averment in its Answer, responds equivocally in violation of the pleading requirements of Fed.R.Civ. Pro. 8(b) and 8(d):

> 14. The ABA admits that it is involved in the process of investigating and evaluating the qualifications of candidates for the federal judiciary. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied. (J.A.66).

There is nothing "inconsistent" with opposing a prospective judicial nominee which one finds "unqualified," or supporting a candidate which one finds to be "well qualified." On the contrary, the two functions are entirely consistent. Accordingly, WLF's allegation on this point must be taken as admitted. *See Lipton Industries Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1030 (CCPA 1982)("An answer which attempts to evade the pleading requirements of Rule 8 by the tactic of an equivocal admission or denial is an admission"). *See also ABA Brochure* 7 (J.A.49) (ABA Committee "will oppose the nomination [of unqualified nominees] in such ways as may be appropriate under the circumstances"); ABA Constitution and By-Laws, Article 30 (ABA Committee may "promote" or "oppose" the "nomination and confirmation of...persons for appointment as judges of the courts of the United States"). Thus, even under the ABA's own criteria, its Committee is an

The courts have consistently construed the definition of "advisory committee" broadly as intended by the Congress. In *Food Chemical News, Inc. v. Davis*, 378 F.Supp. 1048 (D.D.C. 1974), the court ruled that two separate "informal" meetings by agency officials with consumer representatives and members of the distilled spirits industry regarding proposed agency regulations were meetings of "advisory committees" utilized by the agency to obtain advice within the meaning of FACA. In *National Nutritional Foods Association v. Califano*, 603 F.2d 327 (2d Cir. 1979), the Second Circuit held that a group of five physicians who had been in town for a conference and had met with FDA officials only once to advise them on proposed regulations constituted a federal advisory committee. The court concluded that the group, like the group of industry representatives in *Food Chemical News*, was relied upon by government officials and that FACA therefore applied. The court added that "[i]f the straitjacket [of FACA] is too tight, Congress is free to loosen it." 603 F.2d at 336. *See also Center for Auto Safety v. Tiemann*, 414 F. Supp. 215 (D.D.C. 1976), *aff'd in part on other grounds sub nom., Center for Auto Safety v. Cox*, 580 F.2d 689, 693 (D.C. Cir. 1978)("plain meaning" of FACA applies to agency's use of independent, pre-existing organization established in 1914; any statutory exemptions from FACA "should be construed narrowly"). If an informal, *ad hoc* group such as that described in *National Nutritional Foods* is considered an "advisory committee" under FACA, the ABA Committee's long-standing advisory role with DOJ is certainly covered as well.

B. GSA Regulations

The General Services Administration (GSA) has promulgated regulations describing the kinds of circumstances and committees that would and would not

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advisory committee under FACA.

be covered by FACA. *See* 41 C.F.R. Subpart 101-6.10. Not surprisingly, the DOJ, in the court below, did not even refer to these regulations, let alone argue that they could be construed to exempt the ABA Committee from FACA coverage. Nevertheless, because the court below examined the GSA regulations and because the ABA is likely to raise the GSA regulations as a defense in this Court, *see* ABA Answer, First Affirmative Defense (J.A.62), appellant will briefly address these regulations.

The GSA definition of "advisory committee" fairly tracks the broadly worded FACA definition, stating in pertinent part that an advisory committee is any committee "established or utilized by the President or any agency official for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of his or her responsibilities." 41 C.F.R. 101-6.1003. The word "utilized" is also broadly defined as the use of a committee or group

> composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the Federal Government which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

Id. As the lower court correctly concluded, the ABA Committee "fits squarely within this definition. The Committee's historically lengthy, direct, and significant relationship with DOJ in the evaluation process has clearly made it a preferred source of advice in the nomination process" (App. 9a).There can also be no doubt that the ABA provides its "advice or recommendations" on "issues or policies." 41 C.F.R.

101-6.1003. Clearly, whether a candidate is fit to be a judge is an "issue" before the DOJ, and the selection of competent candidates who share the President's judicial philosophy is a "policy" within DOJ's scope of responsibility. It is no accident that the responsibility of screening judicial candidates has been placed in the Office of Legal *Policy*. 28 C.F.R. 0.23(d).

In short, under both FACA and GSA regulations, the ABA Committee possesses all the indicia of an advisory committee and no indicia that would warrant exempting it from that designation. *See App.* 13a, n.34; 41 C.F.R. 101-6.1004.

C. The Legislative History

Since the common-sense meaning of the definition of "advisory committee" in FACA and the GSA regulations clearly encompasses the ABA Committee, there is no need to resort to the statute's legislative history to determine the statute's meaning. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)(if "intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

In any event, neither the DOJ nor the ABA has ever argued that such history contains any "*clearly expressed* legislative intent to the *contrary*." *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (emphasis added). Rather, appellees improperly turn the legislative history inquiry on its head. They claim that FACA should not apply to the ABA because, in their view, there is no clearly expressed legislative intent in the *affirmative* that Congress wanted FACA to cover a group such as the ABA Committee which (1) is "not established or funded in any manner by the federal government," (2) is "not a narrow special interest group out to promote its particular viewpoint" but is "broadly based," (3) gives advice on personnel evaluations, and

(4) advises the President on "matters exclusively committed to the President under the Constitution." DOJ Motion to Dismiss at 18; ABA Mem. 10, 19, 20. All of these contentions are meritless. Indeed, an examination of the legislative history clearly *supports* rather than contradicts the lower court's conclusion that the ABA Committee is an advisory committee under FACA.

1. The fact that the ABA Committee may not be "established or funded" by the federal government is not a sufficient reason for excluding the ABA Committee from FACA's coverage. The express terms of FACA apply to "*any* committee" "established *or utilized*" by the government, regardless of funding. FACA, § 3(2)(C). Furthermore, the Senate Report, in explaining its version of the bill, stated:

> The intention is to interpret the words "established" and "organized" in their most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and *whether or not Federal money is expended*, to obtain advice and information, such group is covered by the provisions of this bill.

S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). (emphasis added). The final version of the bill included FACA coverage to committees either "established" or "*utilized*" by the government.

2. Nothing in the language of FACA or the GSA regulations indicates any exemption for committees that are, or claim to be, broadly based. The fact that the undue influence of government officials by special interests may have been the primary motivating force behind FACA's passage is no reason to read the statute narrowly. On the contrary, a broad reading of FACA furthers that purpose. By applying the disclosure and other provisions of FACA, the Congress intended the law

to have a prophylactic effect so as to ensure the integrity of agency decision-making. In addition, past agency practice of DOJ and past Presidents demonstrates that the Executive branch views FACA as applicable even to advisory committees which do not represent special interests.[13] This past practice is evidence of the Executive branch's "gloss" on the statute that comports more with WLF's position than appellees.

In any event, the ABA is widely considered to be a special interest or trade group, which lobbies for its point of view before the Congress, the agencies, and courts of law. The ABA's members are lawyers who not only litigate cases for their private clients but are themselves subject as attorneys to sanctions by the courts, F.R.Civ.Pro. 11, or to awards of attorneys' fees under 42 U.S.C. 1988. The ABA and the ABA Committee may very well have a negative view of judicial candidates who they think will be strict in enforcing sanctions, or conservative in awarding attorneys' fees. It is extremely naive to suggest that the ABA and its members have no institutional or personal stake in the outcome of the makeup of the federal judiciary. Aside from these obvious special interests, there may also be less obvious ones, such as those proffered by WLF in the court below that give rise to a conflict of interest between the ABA Committee and the candidate under review.[14]

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[13] *See, e.g.*, Attorney General's Commission on Pornography, 50 Fed. Reg. 8684 (1985); President's Special Review Board ("Tower Commission") established under FACA to study and make recommendations concerning the role of the National Security Council in wake of Iran/Contra matter. Exec. Order 12,575, 51 Fed. Reg. 43718 (1986); United States Circuit Judge Nominating Commission, Exec. Order 12,059, 43 Fed. Reg. 20949 (1978); Presidential Advisory Board on Ambassadorial Appointments, Exec. Order 11,970, 42 Fed. Reg. 7919 (1977). The functions performed by these last two presidential advisory committees are essentially the same, if not identical, to the function performed by the ABA Committee in the instant case.

[14] For example, the ABA Committee was called upon in 1985 by DOJ to investigate William F. Harvey, former dean of and current professor at Indiana University School of Law at Indianapolis, for a position on the Seventh Circuit. From 1981-82, Professor Harvey had been President Reagan's

3. The legislative history of FACA clearly demonstrates that Congress did not intend to exempt personnel matters from the purview of the Act. The Senate Report considered and dismissed concerns about public participation in advisory committee meetings, concerns which had been expressed by those agencies whose advisory committees:

> dealt with such issues as national defense and foreign policy, trade secrets, matters relating to the regulation and supervision of financial institutions and markets, and information concerning the *competence and character of individuals*, such as that taken up by the grant review committees of the National Institutes of Health, the National Science Foundation and NASA.

S.Rep. No. 1098, 92d Cong., 2d Sess. (1972), *reprinted in Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents,* 95th Cong., 2d Sess. 166 (emphasis added).

There are scores of advisory committees successfully operating under FACA's coverage that advise the National Institutes of Health, National Endowment of the Arts, and other agencies on matters dealing with "peer review," grant applications, or personnel. *See, e.g.*, U.S. Dep't of Health and Human Services, *NIH Advisory Committees* (1988). As previously noted, advisory

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Chairman of the Board of the Legal Services Corporation, an agency of special interest to the ABA. During that time, he and his Board had cut wasteful LSC expenditures and special grants. One of those LSC grant recipients was the ABA which had received $485,000 from the LSC under Professor Harvey's predecessor. Not only was the ABA highly critical of Professor Harvey's stewardship at LSC because of his "defunding" policy, the ABA Committee member responsible for investigating Professor Harvey's judicial qualifications in 1985 was also the same person in charge of the ABA's "Fund for Public Education," the actual recipient of past LSC largesse. Needless to say, the ABA Committee's conflict of interest was both real and apparent causing Professor Harvey's nomination to be derailed before it could even reach the President's desk.

committees screening judicial and ambassadorial candidates had been established under FACA to perform nearly identical screening functions as that performed by the ABA Committee. Over the years, FACA has been amended by the Congress, and regulations were promulgated by GSA. Yet no one has ever suggested to the Congress or to GSA that FACA *not* apply to such personnel matters. If there were any such suggestions, they were obviously ignored.

4. Nor is there any merit to the argument that Congress intended to exempt groups from FACA which advise the President on the exercise of his powers. When Congress intended to exempt certain governmental entities or functions from the reach of FACA or FOIA, it did so in clear and unmistakable language. *See* FACA, § 4(b)(1) (FACA "should not be construed" to apply to the Central Intelligence Agency or Federal Reserve System). Surely, by expressly including advisory committees that advise the President under FACA's coverage, the Congress intended to cover committees that advise the President on the exercise of both his exclusive and shared powers. DOJ's and ABA's (ABA Mem. 18-19) reliance on *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) *vacated as moot*, No. 75-1969 (D.C.Cir Jan. 10, 1977) and *National Anti-Hunger Coalition v. Executive Committee*, 557 F. Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C.Cir. 1983) for a contrary proposition is misplaced.

In *Nader v. Baroody*, the plaintiff sought to bring within FACA's coverage biweekly multi-issue meetings between Executive branch officials and such diverse business and private sector groups as women's groups, church groups and senior citizens. 396 F. Supp. at 1232. The court noted that "the Act was not intended to apply to all amorphous, *ad hoc* group meetings." *Id.* at 1233. The circumstances in *Baroody* are clearly distinguishable from those in the instant case. In addition, there is no evidence, nor did the lower court in the instant case find any, that if FACA were to apply to the ABA Committee, there would be an intrusion on "the day-to-day

functioning of the presidency" as was feared by the court in *Baroody*. A holding in the plaintiff's favor in *Baroody* would have otherwise called into question the applicability of FACA to any meeting by the President with two or more people. Such a possibility is of no concern here, of course, since the facts show that ABA Committee never meets with the President, but instead deals with DOJ officials.

Unable to point to any pertinent legislative history of FACA supporting their narrow construction of FACA or any authoritative case law, the appellees attempt to divine the intent of the Congress which enacted FACA in 1972, by looking at the legislative history of an entirely different law passed by an entirely different Congress six years later. *See* ABA Mem. 19-20. The Omnibus Judgeships Act of 1978, P.L. 95-486, 92 Stat. 1629 (1978) -- which created new judgeships on the condition that the President establish merit selection criteria, but indicated that he need not follow them -- has absolutely nothing to do with discerning the intent of the Congress which enacted FACA in 1972.[15] Not surprisingly, neither the ABA nor DOJ cite any authority for the novel canon of statutory construction that the intent of a later Congress can be imputed to a prior Congress with respect to different pieces of legislation.

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[15]In response to this legislation, President Carter issued Executive Order 12,097 establishing standards for evaluating proposed judicial nominees and requesting the Attorney General to assist the President in recommending nominees. 43 Fed. Reg. 52455 (1978). That order remained extant throughout most of the Reagan Administration until it was revoked by Executive Order 12,553, 51 Fed. Reg. 7237 (1986). Appellant is unable to locate any current order or directive which requests the Attorney General to assist the President in the exercise of his judicial appointment powers, as there is, for example, an order authorizing the Attorney General to assist the President in exercising his pardon power, which is an exclusive rather than shared power of the President. *See* 28 C.F.R. Part 1; 48 Fed. Reg. 22290 (May 18, 1983) (Attorney General Order No. 1011-83 signed and approved by President Reagan). The absence of such a directive brings into question the suggestion by DOJ that the President "deems necessary" that the Attorney General use the ABA Committee. *See* Def. Statement of Material Facts ¶ 1 (J.A.34); Plaintiff's Rule 56(f) Affidavit, ¶ 2 (J.A.53).

Furthermore, the defendant's reliance on legislative acquiescence in the face of the Executive's *de facto* exemption of the ABA from FACA coverage is hardly evidence of legislative intent. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495, n.13 (1985) ("congressional silence, no matter how 'clanging,' cannot override words of the statute"); *United States v. Locke*, 471 U.S. 84, 95 (1985). *See also* Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L. J. 515 (1982) ("legislative inaction--whatever intent it might signal--is *a fortiori* a forbidden source of law").

It is evident that no construction of FACA is "fairly possible" that would exempt the ABA Committee from FACA's coverage without doing severe violence to the intent of Congress. We now turn to the separation of powers objections raised by the court below.

II. THE APPLICATION OF FACA TO THE ABA COMMITTEE WOULD NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

In determining whether an Act of Congress violates the separation of powers, this Court has adopted a "functional analysis" approach to the issue as suggested by James Madison in Federalist No. 47, rather than a formalistic approach which views the three branches of government as entirely separate and compartmentalized. In the leading case of *Nixon v. Administrator, General Services*, 433 U.S. 425 (1977), this Court rejected a separation of powers challenge to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note, empowering the General Services Administration with authority to control the disposition of presidential records. In so doing, the Court formulated the separation of powers test as follows:

> Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight

> departments of government," 408 F. Supp., at 342. Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on *the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v. Nixon*, 418 U.S., at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives *within the constitutional authority of Congress. Ibid.*

433 U.S. at 443 (emphasis added) (footnote omitted). *Accord Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986). This functional analysis test has been employed repeatedly by this Court, as it was in *Morrison v. Olson*, 108 S.Ct. 2597 (1988) (holding that the independent counsel statute did not violate separation of powers), and most recently in *Mistretta v. United States*, 57 U.S.L.W. 4102 (January 18,1989) (upholding constitutionality of statute placing U.S. Sentencing Commission within judicial branch and having judges serve on the Commission). If this Court found no violation of the separation of powers in *Morrison* and *Mistretta*, where substantive powers of the Executive and Judicial branches were diminished by the statutes involved in those cases, surely there can be no violation of the separation of powers in this situation where FACA does not usurp any substantive power of the Executive branch at all, but merely constitutes a procedural statute governing the use of private advisory committees.

While the district court correctly noted that the *Nixon v. GSA* test was the proper one to consider (App. 16a, n.37), the lower court seriously misapplied it. The court struck down FACA as applied to the ABA Committee on separation of powers grounds

> because of the express provision of Article II, sec. 2, cl. 2 of the Constitution that the President alone shall

> nominate candidates for federal judgeships. The role of Congress is limited to the Senate's advice and consent function. Furthermore,...the purposes of FACA are served through the public confirmation process and any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality and freedom of consultation in selecting judicial nominees.

(App. 27a). The threat that FACA poses to the President's nominating power was clearly more imagined than real. The lower court's initial error was prematurely ruling that FACA cannot be constitutionally applied without letting any of its provisions be applied by the Executive in a factual setting.[16]

The lower court not only prematurely and unnecessarily resolved the separation of powers issue, it did so incorrectly. The district court grossly overestimated the intrusion that FACA would have on the President's appointment power, and seriously underestimated the legitimate authority Congress has over this area.

Accordingly, WLF will first briefly examine the history of the Appointments Clause of Article II as well as discuss the additional Constitutional powers Congress enjoys in this area, none of which were discussed below. All of these powers, either singly or together, provide compelling support for Congress' interest in the judicial nominating process. WLF will then apply the functional test to show that FACA does not intrude on the

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[16] *See Pennell v. City of San Jose*, 108 S.Ct. 849, 856 (1988) ("premature" to consider "constitutionality of statutes...except in an actual factual setting that makes such a decision necessary"). For example, the chartering provision of FACA would certainly not implicate the separation of powers or confidentiality concerns. Yet, the ABA Committee may even find DOJ's attempt to simply charter it as an advisory committee objectionable and decide instead to discontinue providing its advice to the Justice Department. In such a case, there would be no need to address the applicability *vel non* of the remaining FACA provisions.

President's nominating power and falls far short of threatening any violation of the separation of powers.

A. The Congress Possesses Numerous Powers Under The Constitution To Regulate In This Area Which Were Improperly Ignored By The Court Below.

1. The Senate's "Advice and Consent" Power Under The Appointments Clause.

The constitutional history of the Appointments Clause with respect to the judiciary indicates that initially, there was no role whatsoever contemplated for the President. The debate centered around whether to place the entire appointment power in the full Congress or lodge it in the Senate. Thus, Charles Pinkney and Roger Sherman originally proposed on June 13, 1787, that there should be "one supreme tribunal, the Judges of which to be appointed by the national Legislature." J. Madison, *Notes of Debates in the Federal Convention of 1787*, 112 (1976) ("*Madison's Notes*"). James Madison objected to the proposal, and offered a motion instead that appointment be in the Senate, "which as a less numerous & more select body, would be more competent" to assess the qualifications of judges. Madison's motion was agreed to. *Id.* at 113. [17]

Alexander Hamilton, who favored a strong Executive, subsequently proposed on June 18 that the Executive was "to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the *approbation or rejection* of the Senate...." *Id.* at 138

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[17]The only role for private lawyers in the appointment process that was mentioned during the debates was the one suggested in jest by Benjamin Franklin who recounted "a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves." *Id.* at 68.

(emphasis added). Hamilton's proposal made no express provision for the Supreme Court, in contrast to all the other proposals, since his focus was on strengthening the President's power with respect to the appointment of those who would serve the President in the Executive branch rather than in the independent Judiciary.

In any event, the debate over where to place the appointment power with respect to the Supreme Court continued. Motions by Nathaniel Gorham and later by Madison to have the Executive participate with the Senate in this power failed on July 18 and 21. *Id.* at 317, 346. Thus, the June 13 resolution for placing the appointment of "Judges of the supreme Court" solely with the Senate was retained.

The matter lay dormant for several weeks and did not come up again until the closing days of the convention in September when the Special Committee on Postponed Matters issued a report covering Judges of the Supreme Court as well as certain executive officers, and placing the appointment power in the Executive with the advice and consent of the Senate. With little debate, this compromise measure was adopted. *Id.* at 599.

The history of the appointment power thus demonstrates that the Senate was always considered to have a significant role to play in the process. It also shows the Framers' separate consideration of the appointment power as it relates to the Judiciary as opposed to the Executive branch.

In addition to quoting Hamilton's *Federalist* 76, the court below also relied on John Adams who is quoted as saying that the President "ought to select the [candidates] best qualified and most meritorious for offices . . . without being shackled by any check by law, constitution or institution. Without this unrestrained liberty, he is not a check upon the legislative power nor either branch of it." IX *Works of John Adams* 634 (1854 ed.)(App. 17a,

n.38).[18] It is significant that during the Adams Administration, Congress demonstrated a more active "advice and consent" role in the selection process for judicial nominees than the lower court mistakenly suggests our Founding Fathers to have understood.

Following the enactment of the Judiciary Act of 1801, which created certain circuit judgeships, members of the Congressional delegations from New York, Vermont, and Connecticut met and agreed on recommending three names to the President. Adams had considered selecting Oliver Wolcott, his ex-Secretary of the Treasury, and approached the Senator from Connecticut to determine if he would be acceptable to the Connecticut delegation. The Connecticut delegation, after some internal debate on whether to support another candidate, finally agreed to Wolcott. As one commentator observed:

> This incident is significant in that it shows (1) that the Connecticut, Vermont, and New York delegations took the initiative in suggesting names for judgeships; (2) that Adams acted on his own initiative in suggesting Wolcott, but before nominating him consulted the congressional delegation from his State; (3)that the Connecticut delegation took it for granted that Wolcott would not be confirmed without its approval, but at the same time admitted that in theory, at least, the President was not bound to follow its recommendation, and (4) that although a Senator was the spokesman for the

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[18]This is not a surprising position taken by John Adams, for occasionally President Adams left himself open to criticism for some of his appointments. As one commentator noted:

> [Adams'] repeated efforts to appoint his vain and ambitious son-in-law, Col. William S. Smith, to high military office, led on one occasion to a sharp rebuff by the Senate, where ... Smith mustered only two votes. Adams, although his own opinion of Smith was not high, felt the "disgrace" keenly.

Swanstrom, *The United States Senate 1787-1801*, Sen. Doc. 99-19, 99th Cong., 1st Sess. 109 (1985) (footnote omitted).

> delegation, each member, Senator and Representative alike, had a *voice in the deliberations on appointments*--in other words, "congressional courtesy" was the rule rather than "senatorial courtesy."

Swanstrom, *supra,* at 111 (emphasis added). Since that time, "senatorial courtesy" has become the established practice, particularly with respect to district court nominees, whose judicial posts are located within the Senator's particular state and whose rulings affect interests in those states.[19]

In determining the intent of the Framers with respect to the "advice and consent" role of the Senate, the historical practice is relevant. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Thus, the Senate's "advice and consent" role was in practice, no less than in theory, not a merely passive one, but an active one on which the Executive heavily and consistently relied, and which the Senate expected to exercise.

2. Congress' Power Under Article III To Establish And Regulate "Inferior Courts."

Article III provides that the judicial power is vested in the Supreme Court" and in such *inferior* Courts as the Congress may from time to time ordain and establish." (Emphasis added). Thus, all district courts and courts of appeals are created and established by the Congress (28 U.S.C. 43, 133), and presumably, Congress can abolish any or all of them. *See Crenshaw v. United States*, 134 U.S. 99 (1890). *See also* Art. I § 8, cl. 9 (power to "[c]onstitute Tribunals inferior to the supreme Court).

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[19]See Grossman, *supra*, at 30-39; 42. Thus, while Presidents have traditionally considered Supreme Court nominees to be their personal prerogative, district court nominees have been regarded as the prerogative of the senators of the same party of the President, while nominations to the courts of appeals "appear to 'go either way,' depending on the case at hand." *Id.* at 27.

Pursuant to these powers, Congress has extensively regulated the conduct of judges, the exercise of their authority, and has even mandated certain qualifications.[20] The President, on the other hand, has no powers *whatsoever* with respect to the conduct and the operation of the judiciary or individual judges. His lack of authority in this regard stands in marked contrast to the power he enjoys over appointees in the Executive Branch who are subject to the President's control, direction, and removal.

3. Congress' Power Under Article II Regarding "Inferior Officers."

The lower court held that FACA "cannot be constitutionally applied to the [ABA] Committee because of the express provision of Article II, § 2, cl. 2 of the Constitution that the President alone shall nominate candidates for federal judgeships" (App. 27a). Article II, however, is not expressed in so absolute terms. Article II gives the President the exclusive power to nominate "Judges of the supreme Court" and "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." But Article II also vests the Congress with the power to place the appointment of "inferior officers" in the "President alone, Courts of law, or Heads of Departments." Since the lower courts are referred to as "inferior" courts which may be created by the Congress under Art. III, lower court judges could also be considered "inferior Officers" in an Article II sense.

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[20]Congress sets residency requirements for appointees to the lower courts (28 U.S.C. 44(c); 134(b)); defines and limits the court's subject matter and territorial jurisdiction (28 U.S.C. 1331); enacts rules of evidence (28 U.S.C. 1731), mandates a judge's recusal in appropriate cases (28 U.S.C 455); provides for disciplinary measures to be taken against judges (28 U.S.C. 372(c)); and can ultimately remove judges from office (Art. II, sec. 4).

If that is true, then the Congress could, under Article II, vest the appointment of such "inferior" judges "in the President alone, in the Courts of Law, or in the Heads of Departments." Congress has mandated that the method of lower court appointments shall be by the "President...by and with the advice and consent of the Senate...."28 U.S.C. 43, 44(a). Since certain interbranch appointments are constitutionally permissible, *see Morrison v. Olson*, 108 S.Ct. 2597 (1988), Congress could choose to vest the judicial appointment power in the Attorney General as "Head of [his] Department," where the power effectively is located and exercised anyway. Congress may also choose to vest the appointment of lower court judges in the Supreme Court or in the Chief Justice; such an intrabranch appointment would, *a fortiori*, pass constitutional muster. While there has been no litigation directly on this point,[21] one scholar concluded in an extensive three-part treatment on the subject, that lower court judges are "inferior officers" in an Article II sense and therefore, the Congress could divest the President of the appointment power of those judges and place it in the Chief Justice or in the Supreme Court. *See* Shartel, *Federal Judges: Appointment, Supervision, and Removal--Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485, 723, 870 (1930). Professor Shartel carefully examined the proceedings of the Constitutional Convention with respect to the appointment power and how the Framers focused only on judges of the Supreme Court in all of the drafts, whereas judges of lower courts were never referred to. He also examined the history of and practice under other provisions of the Constitution, such as Art III authorizing Congress to create "inferior courts," and Art. 1, sec. 8, cl. 9 authorizing Congress "to constitute Tribunals inferior to the supreme Court;" the acts and debates of

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[21] *See Clark v. United States*, 72 F.Supp. 594, 601 (Cl. Ct. 1947), *cert. denied*, 333 U.S. 833 (1948)(Congress cannot "vest...authority [to appoint circuit court judge] in itself [but] could vest it only 'in the President alone, in the Courts of Law, or in the Heads of Departments'") (dictum).

Congress; the wide discretion enjoyed by Congress in determining who is an "inferior officer;" the Executive practice; and the practice of courts and judges, including the supervisory role the Supreme Court has over lower court judges. Professor Shartel makes a compelling case that the "inclusion of federal judges among inferior officers is quite in harmony with the proceedings of the Constitutional Convention" and that the framers did not intend "to confer on the President and Senate as a joint agency, an irrefragable Constitutional hold on their appointment." *Id.* at 534. Obviously, if Congress has the power to divest the President of the power to appoint judges to "inferior courts," Congress' interest in ensuring the integrity of the current method of appointment could not be questioned. This Court need not reach this issue unless it determines that all of the other powers of Congress in this area are insufficient to support the application of FACA to the judicial screening process.

4. *The Necessary and Proper Clause.*

In addition to the extensive powers that Congress enjoys over the judiciary under Articles II and III, Congress has power under the Necessary and Proper Clause of Article I to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" Art. I, sec. 8, cl. 18 (emphasis added). Thus, with respect to the instant case, Congress has a constitutional interest in the exercise of the nomination and appointment power of the President, and especially so since it is a power in which the Senate has an express role to play. Congress similarly has a constitutional interest in the functioning of the Department of Justice, an agency created by the Congress.

This Court first acknowledged the expansiveness of the power enjoyed by the Congress under the Necessary and Proper Clause in *McCulloch v. Maryland,* 17 U.S. (4

Wheat.) 316 (1819). With respect to the power of Congress to control agency documents and ensure the integrity of the operation of the federal government, this Court has similarly found within the Necessary and Proper Clause ample authority for Congressional legislative activity to make procedural rules in this area. [22]

FACA is a law designed to ensure integrity in the decision-making process of the government by regulating the manner in which government employees and officers rely upon private organizations to perform what is essentially government functions. In that respect, the Necessary and Proper Clause provides the Congress with additional authority to regulate in this area which was overlooked by the court below.

Accordingly, while appellant submits that the Senate's "advice and consent" power under Article II is more than sufficient to justify FACA's applicability to the nominating process, other related constitutional powers belonging to the Congress described, *supra*, further support its legislative interest in this area.

B. The President's Power of Appointment Is Not Implicated In This Case Since The ABA Committee Advises Only The Attorney General.

To the extent that FACA regulates the manner in which advice may be given to the Attorney General, no separation of powers concerns arise, since the Attorney

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[22] *See Boske v. Comingore*, 177 U.S. 459, 468 (1900)(Necessary and Proper Clause gives Congress power to authorize promulgation of regulations of agency's "custody, use and preservation of records, papers, and property appertaining to it"); *Ex Parte Curtis*, 106 U.S. 371 (1882) (laws designed "to promote *efficiency and integrity in the discharge of official duties* . . . . [c]learly ... is within the just scope of legislative power") (emphasis added); *Burton v. United States*, 202 U.S. 345, 367 (1905) (upholding law designed to keep Executive officers from being subjected to undue influence in their decision-making process: "There can be no reason why the Government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs").

General, whose office, department and duties are defined by the Congress rather than expressed in the Constitution, has no nomination or appointment power under the Constitution.[23] The Justice Department's assertion below that the Attorney General serves sometimes as an advisor to the President does not compel a different result.

In *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the Department of Justice was sued under the Freedom of Information Act seeking documents provided to the Attorney General with regard to his assumed duties in evaluating judicial candidates. There, the court rejected the government's argument that the records were not agency records but were documents belonging to the Attorney General as "'counsel and advisor to the President' in furtherance of the President's power to nominate judges." *Id.* at 786. In language that is equally instructive in the instant FACA context, the *Ryan* court observed:

> Although the documents are for the ultimate benefit of the President in a nominating role that is exclusively his, we find that the Attorney General was acting as an independently controlling entity, and not a mere conduit. The questionnaires solicited responses from Senators *at the request of the Attorney General, not the President.* In his cover letter enclosed with the questionnaires, the Attorney General stated the independent role he was to play in this process: he was to consider certain factors before making *his own recommendations to the President* as to judicial nominees. This is an independent exercise of judgment that the Attorney General has traditionally taken in the judicial nomination

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[23] As a historical matter, until the Pierce Administration, the Secretary of State (rather than the Attorney General) screened federal judicial candidates, as well as other federal officers. Grossman, *supra*, at 25.

> process. The logical deduction from the facts is that the Attorney General was to control the questionnaire responses for the purpose of carrying out *his independent* duties.

617 F.2d at 786 (emphasis added).

In the instant case, it is the Attorney General (or more accurately, the Assistant Attorney General, Office of Legal Policy), not the President, who solicits and considers the ABA's advice and recommendations. He does so in order to make "his own recommendations to the President." Indeed, the Matthews Declaration repeats the relevant language from the *Ryan* case by stating, "The Attorney General considers the ABA evaluation in making *his own recommendations to the President* regarding potential nominees...." Matthews Declaration ¶ 4 (emphasis added). Accordingly, the constitutional implications of applying FACA in this case were greatly exaggerated by the government and the lower court.[24]

C. FACA Does Not Usurp Any Substantive Power of The President or Aggrandize Congressional Power.

Even assuming, *arguendo*, that the ABA does provide advice and recommendations directly to the President, the initial separation inquiry is focused on the "extent to which [FACA] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. GSA*, 433 U.S. at 443.

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[24] *See also In re Attorney General of the United States*, 596 F.2d 58, 62 (2d Cir. 1979) ("[E]xecutive responsibility and constitutional status of the Attorney General do not compare to those of the President. The Attorney General has no greater authority over his department's official records than does any other Cabinet officer. Since the earliest days of this nation, courts have declined to accord to Cabinet or other executive officials the same prerogatives that they accord to the President.").

1. *FACA Would Not Intrude On The President's "Core" Power To Nominate Judges.*

The application of the procedural requirements of FACA to the judicial nominating process clearly does not "prevent the Executive Branch from accomplishing its constitutionally assigned function." Significantly, there was no record evidence in this case submitted by the Department of Justice to the effect that application of FACA to the ABA Committee would disrupt either DOJ's role in screening judicial candidates for recommendation to the President, or the President's ability to seek advice from his immediate advisors on this subject. As DOJ states, the nomination process involves input not only from the ABA Committee, but from Senators, Presidential advisors, other governmental sources, and from private individuals. Matthews Declaration ¶ 2 (J.A.20). However, *individual* advisors to the President, whether private or government officials, are not covered at all by the Act. Nor does FACA apply to full-time government employees, such as appears to be the case with the President's judicial selection committee. Only those "*committees*" composed of private individuals are subject to FACA.

The only component in the nomination process possibly affected by FACA is the ABA Committee, and even that component did not play a part in it until 1952, prior to which hundreds of excellent judges were appointed to the bench by numerous Presidents. Thus, not only does the President's "core" power of appointment remain completely untouched by FACA, his implied power to receive advice on the exercise of that power is, for the most part, totally unaffected by FACA.

The procedural requirements of FACA stand in sharp contrast to other legislation that unconstitutionally interfered with the exercise of a substantive power of the President. *See, e.g, Myers v. United States*, 272 U.S. 52 (1926); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bowsher v. Synar*, 478 U.S. 714 (1986). The Executive is no more free to ignore the procedural requirements of FACA in

the exercise of its decision-making powers than a court is free to ignore, for example, the Federal Rules of Evidence in exercising its judicial powers under Article III.

2. *The Lower Court Mistakenly Ignored The Exemptions In FACA That Accommodate Any Confidentiality Concerns.*

Even if the ABA Committee's advice is deemed necessary by the President, FACA itself contains express provisions for exemptions to the openness requirements. These exemptions have been invoked by the Executive in utilizing advisory committees that perform functions similar to those of the ABA Committee.

But even if assuming that confidential communications between the ABA and DOJ are considered necessary, despite the conflicting and vague claims on this issue, the lower court failed to let the law be applied in *any* of its aspects in order to determine whether the exemptions from disclosure found in FACA could accommodate them.

The court below apparently thought it had to give an "all or nothing" ruling rather than using its substantial equitable powers to fashion appropriate relief. For example, the court could easily have adopted the proposed orders submitted by both WLF and intervenor Public Citizen (J.A. 33, 58) which simply requests the district court to order the Justice Department to apply the law to itself and the ABA Committee in the first instance, at which point the court would get a better understanding of any problems that FACA may cause. In that regard, the lower court also failed in its duty to save as much of a statute as is constitutionally possible in order to give effect to the intent of Congress. *See United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971).

While the court correctly noted that the deliberative process exemption under FOIA is inapplicable to advisory committee meetings (App. 24a, n.56), *see* Pub.

L. No. 94-409, Sec. 5(b), 90 Stat. 1247 (1976), the court failed to examine the other provisions of FACA that might well satisfy the alleged confidentiality concerns of the government. Thus, the government is free to invoke, for example, exemption (c)(6), dealing with meetings about personnel matters;[25] (c)(7), dealing with certain investigatory records used for law enforcement purposes;[26] or (c)(9)B, dealing with meetings where openness would frustrate implementation of policy.

D. Any Intrusion By FACA In The Nomination Process Is Outweighed By Congress' Need To Promote The Integrity Of The Decision-Making Process.

Assuming, *arguendo*, that the lower court was correct in concluding that there would be an intrusive impact in the application of FACA upon the Executive's role in the nominating process, that is only the beginning of the inquiry, for the court must then balance or weigh that intrusion with the Congressional interest in legislating in this area to see if the law is "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. GSA*, 433 U.S. 425, 443 (1977). The lower court simply stated that since the Senate has a constitutional role to play in the nomination process, the integrity of the decision-making process and the ABA Committee's role in it, "is satisfied through the confirmation proceedings" conducted by the Senate Judiciary Committee. App. 25a.

In appellant's view, the very fact that the Senate has a constitutional role to play in the judicial nominating

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[25] *See, e.g.*, 42 Fed. Reg. 64940 (1977) (President's Advisory Committee on Ambassadorial Appointments invoking 5 U.S.C. 552b(c)(6) to close meeting); 53 Fed. Reg. 49794 (1988) (National Institute of Health "peer review" advisory committee closing meeting under 5 U.S.C. 552b(c)(4), (6)).

[26] *See, e.g., Information Acquisition Corp. v. Dep't of Justice*, 3 GDS ¶ 83,149 (D.D.C. 1981).

process is evidence of greater, not less, Congressional authority in this area. Otherwise, one could argue that FACA and FOIA's "intrusion" on other Executive functions are not outweighed by the public interest in disclosure since oversight of those agencies or activities can be conducted by the respective committees in the Senate and House of Representatives. This argument could similarly be used to exempt from FACA coverage those committees which make recommendations to the President for legislative changes, since the Congress eventually would be called upon to consider any such initiatives.

While there is some degree of public scrutiny available under the public confirmation process, that scrutiny is of a limited degree, especially with respect to the nomination of lower court judges where hearings are less than searching, or where the ABA Committee has not been forthcoming in explaining their investigative techniques and criteria as described earlier in this brief.

The lower court's complete reliance on the confirmation process as a sufficient public safeguard against abuses by the ABA Committee neglects altogether that part of the process completely closed to public scrutiny and accountability where a candidate is "vetoed" before his or her name ever gets to the President's desk, let alone to the Senate Judiciary Committee.

Finally, even if the Court were to find that the application of FACA to the ABA would intrude on the President's appointment powers, appellant submits that the significant public interest values underlying FACA, *i.e.*, the restoration of the public's integrity and confidence in the decision-making process, tips the balance in WLF's favor.

To uphold the lower court would bring into serious question not only this Court's prior rulings in this area, but raise constitutional questions about the constitutionality of FOIA, the Sunshine Act, and a host of other laws that can be said to apply to the exercise of the President's powers.

III. FACA WOULD NOT VIOLATE ABA'S FIRST AMENDMENT RIGHTS.

The ABA has alleged in its Complaint that application of FACA to its ABA Standing Committee on Federal Judiciary would violate the First Amendment rights of speech and association of the ABA Committee. *See* ABA Answer, Second Defense (J.A. 62). In the first place, appellant submits that it is premature to address this issue inasmuch as the court below did not have an opportunity to pass on it. Accordingly, it should be more appropriately addressed there should this Court reverse the district court on the separation of powers question. Nevertheless, we will briefly address the issue to demonstrate that any such claims are groundless.

In examining the permissible level of government regulation of the operation of private organizations, the Supreme Court considers to what degree the private organization is "private." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (state law requiring the Jaycees, a private organization, to accept women as regular members did not abridge the Jaycees' rights of expression and association.); *Hishon v. King & Spaulding* 467 U.S. 69 (1984). Applying the analysis in *Roberts* and its progeny to the case at bar, it is spurious to suggest that the ABA Committee is operating solely as a private organization and thus exempt from all of the provisions of FACA. Rather, the functions performed by groups such as the ABA constitute the exercise of *public* or quasi-public functions, which may even qualify the ABA Committee as "state actors" for purposes of liability under 42 U.S.C. 1983. *See Rouse v. Judges of Circuit Court of Cook County*, 609 F. Supp. 243 (N.D. Ill. 1985) (Chicago Bar Association constitutes "state actor" under section 1983 by acting as a screening committee for judicial candidates). *Cf. National Collegiate Athletic Ass'n v. Tarkanian*, 109 S.Ct. 454 (1988). The ABA Committee is performing precisely the same governmental functions as the CBA did in *Rouse*.

Accordingly, in considering the ABA's First Amendment argument, this Court should consider the obvious public and governmental functions being performed by the ABA Committee and reject their meritless suggestion that FACA cannot be applied to them.

Even if there is some intrusion on ABA's rights, the public purpose advanced by FACA far outweighs whatever first amendment rights of the ABA Committee are implicated. As has been noted in this brief, the legislative history of FACA is replete with Congress' proper concern with the need to open up the advisory committee process which heretofore had been carried out behind closed doors. Plaintiff submits that FACA is narrowly tailored to serve the compelling governmental interest of ensuring public accountability to the important role that advisory committees play in the decision-making process.[27]

Accordingly, the First Amendment argument should not be considered here since it was not raised below, and in any event, lacks serious merit.

IV. THE LOWER COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT WITHOUT ALLOWING APPELLANT TO TAKE DISCOVERY.

WLF submits that the facts adduced in this case are more than sufficient upon which to affirm the lower court's opinion with respect to the statutory issue, and that the "constitutional facts" are also sufficient to reverse to the lower court with respect to its finding of a violation of the separation of powers, especially since there was no application of FACA's exemptions which might accommodate those concerns. But if there is any doubt about those facts, either with respect to whether

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[27] *See Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978) (advisory committee "has no First Amendment right to have [agency] keep its communications secret").

the ABA Committee constitutes an "advisory committee," or whether the role they play and the impact of FACA on the Executive branch is such that there may or may not be a separation of powers violation, this Court should vacate the judgment and remand for further discovery on these points as requested by WLF when it filed its Rule 56(f) Affidavit seeking discovery below (J.A. 53).

As stated in that affidavit, certain alleged "facts" which may have influenced the court's decision in this case have not been precisely determined, such as whether the President "deems necessary" that the Attorney General receive the input from the ABA Committee as DOJ implies, and to determine more precisely what information is considered "confidential" by the DOJ and what is not. Fleshing out these facts would have put the case in a better factual setting for the court upon which to pass judgement. Under Fed.R.Civ.Pro. 56(f), a district court can either "refuse the application for [summary] judgment *or* may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had *or* may make such other order as is just." *Id.*(emphasis added). Thus, while the DOJ filed a motion to dismiss which was apparently converted into a motion for summary judgment, and while WLF filed an "alternative motion for summary judgment," the court, if it was not inclined to grant WLF's alternative motion, should have either stayed the motions or should have denied both, and allowed some discovery to take place. *See Beavis v. National Security Council*, No. 86-5359 (D.C. Cir., July 14, 1986)(order retaining jurisdiction of FOIA appeal, but remanding to district court for discovery to determine whether documents sought were Presidential and thus exempt from FOIA, or whether NSC as an "agency," had control of documents and thus subject to FOIA); *National Anti-Hunger Coalition v. Executive Committee*, 711 F.2d 1071, 1072 (D.C. Cir. 1983)(further judicial review possible in FACA case in light of facts not in record).

CONCLUSION

For the foregoing reasons, the district court's opinion should be affirmed with respect to its resolution of the statutory issue, but should be reversed and remanded with respect to the constitutional issue.

Respectfully submitted,

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